FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 482

CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; CORNELIUS W. STYER, DOING BUSINESS AS NORTHERN TRANSPORTATION COMPANY; AND GLENDENNING MOTORWAYS, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTIONS TO AFFIRM OR DISMISS.

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CASES CITED.

MISCELLANEOUS.

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Separate motions to affirm or dismiss have been filed by two appellees, Cornelius W. Styer and Glendenning Motorways, Inc. This brief answers both motions.

Neither motion states with any clarity the questions sought to be reviewed. Each labors to make it appear that the only issues are those involving the exercise of the Commission's administrative discretion, which is not

the case at all. (Styer's motion states: "Service of the documents set forth in Rule 12, Paragraph 2, was made upon Appellee Styer on August 19, 1943." That is not correct. Service of the papers referred to was made on Styer's counsel on August 11, 1943. His motion was served on us on September 3, 1943.)

Our Statement as to Jurisdiction summarizes the points on which we seek review. For a more definite presentation of those points, and for the present convenience of the Court, we set out our Assignment of Errors at the end of this brief. The questions embraced in such assignment are clearly presented for decision on the record; appellees' motions make no claim to the contrary.

It is plain that our Assignment of Errors brings up questions which are substantial and which either have not been decided by this Court or have been decided by it in a way which is contrary to the action of the Commission and the District Court. Although it may involve some repetition of the combined contents of our Assignment of Errors and Statement as to Jurisdiction, we briefly summarize such questions here.

(1) In proceedings under the "grandfather" clause of Section 206 (a) of the Interstate Commerce Act, 49 U. S. C. A. 306 (a), the Commission is authorized to permit continuance of operation by a motor carrier who was "—in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time—." Does the Commission have power under that clause to authorize service to a large number of points of substantial importance when the applicant (a) has expressly stipulated that he is not making application to serve such points and (b) makes no proof of service to or of holding out service to such points during the "grandfather" period? *Alton Railroad Co.*

v. *United States*, 315 U. S. 15, 24-25, holds to the contrary, we believe.

(2) Can the Commission ignore and override a stipulation made between the parties and accepted by the Joint Board hearing the matter? The Commission's Rules of Practice in effect when the hearing took place, and its present rules of practice, expressly provide for stipulations between the parties, and state: "It is desired that the facts be thus agreed upon so far as and whenever possible." Interstate Commerce Acts Annotated, vol. 8, p. 6246, vol. 11, p. 9800. The question is substantial. It is the regular and frequent practice in hearings before the Commission to stipulate matters, including stipulations whereby claims are withdrawn or narrowed. By this familiar practice the use of many witnesses and the taking of many hundreds of pages of testimony at a single hearing may be avoided, including witnesses and testimony originally intended to oppose claims withdrawn or narrowed. The action of the Commission in granting authority to points taken out of the case by the stipulation denied appellants a full and fair hearing, because the stipulation advised them that no opposition need be made to the points withdrawn by the stipulation. Irrespective of the Commission's rules, the question is presented whether the traditional, highly useful and heretofore respected stipulation has now ceased to have any standing in law.

(3) Prior to the commencement of the hearing before the Joint Board on his public convenience and necessity application (as distinguished from his "grandfather" application) applicant filed an amendment to his application withdrawing therefrom his request for authority as to "All service in interstate commerce between points in Minnesota." This amendment was accepted by the Joint Board. Applicant presented no evidence respecting the service withdrawn by the amendment. The Commission

granted authority for such service. The questions here have some analogy to those disclosed in paragraphs (1) and (2) above. Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. A. 307 (a), authorizes issuance of a certificate to an applicant who is "* * * fit, willing, and able properly to perform the service proposed * * *." By his amendment the applicant (a) stated his unwillingness to perform the service and (b) led protestants to believe that no resistance to the withdrawn service was necessary. *There is no showing or evidence in the record to warrant the action of the Commission in disregarding this amendment; that is, there is not a hint in the record that this service is required in the public interest and that the amendment therefore ought to be disregarded. This is also true with respect to the stipulation.*

(4) The Commission and the District Court erroneously failed to follow the decision of this Court in *United States* v. *Maher*, 307 U. S. 148. This is fully pointed out in our Statement as to Jurisdiction.

Brief Comment on Appellees' Motions.

The "Motion to Affirm and Dismiss" filed by appellee Styer consists of 25 typewritten legal cap pages. It goes at length into both facts and law. It is very noticeable, however, that this motion does not take up our assignments of error *seriatim*, or in any recognizable order, to show that they present no substantial questions. Surely, if the errors alleged are unsubstantial that situation could be shown by a brief discussion of each error point and citation of apt authority. A motion such as appellee's, dealing at length with the merits, suggests that the questions *are* substantial.

The motion of appellee Glendenning Motorways, Inc., while not long, can be read through without obtaining the

st suggestion as to the nature of the points raised in
r Assignment of Errors.

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t is respectfully submitted that our Statement as to
risdiction, our Assignment of Errors, and this brief
ke it clear that the Court should note probable jurisdic-
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ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

The District Court erred in its final decree dismissing plaintiffs' complaint, and in its opinion, findings of fact, and conclusions of law upon which its decree is based, in the following respects:

1.

The order of the Interstate Commerce Commission authorized defendant-appellee Styer to continue alleged "grandfather" operations under Section 206 (a) of the Interstate Commerce Act over regular routes between St. Paul, Minnesota, and points in South Dakota, and to serve all Minnesota points on such routes east and westbound. The order was erroneous and should have been annulled by the District Court as to all points in Minnesota except St. Paul and Minneapolis, for the following reasons:

(a) A stipulation was made during the hearing before the Joint Board, between Styer and the plaintiffs-appellants, that Styer did not claim and was not seeking the right "to transport goods moving in interstate commerce from any Minnesota point to any Minnesota point" upon the "grandfather" routes.

(b) There is no evidence that during the "grandfather" period Styer picked up or delivered any freight at any of the Minnesota points except St. Paul and Minneapolis, or held out to serve such points.

(c) The evidence shows without conflict that during the "grandfather" period Styer's eastbound operation was an irregular route operation to scattered points in Minnesota, that he did not conduct an eastbound regular route operation, and that he did not serve any of the

points for which authority was granted by the Commission's order except St. Paul and Minneapolis.

(d) Styer made the further statement in said stipulation that "he does seek to transport from points in South Dakota on these routes to all points in Minnesota irregularly," thereby claiming irregular route "grandfather" rights eastbound but not regular route rights.

2.

The Commission's order authorized Styer to begin new operations over regular routes between St. Paul, Minnesota, and points in South Dakota, serving all Minnesota points on such routes, both east and westbound, under Section 207 (a) which requires a showing that such operations are required by present or future public convenience and necessity. The order was erroneous and should have been annulled by the District Court as to all points in Minnesota except St. Paul and Minneapolis, for the following reasons:

(a) Prior to the hearing on his application before the Joint Board Styer filed an amendment to his application withdrawing from such application his request for authority as to "All service in interstate commerce between points in Minnesota."

(b) There is a complete absence of evidence that present or future public convenience and necessity requires such service to said Minnesota points.

Wherefore, plaintiffs-appellants pray that the decree of the District Court be reversed and that a decree be entered as indicated hereinabove.

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Attorneys for Plaintiffs-Appellants.